United States Court of Appeals

for the Second Circuit

APPELLEE'S REPLY BRIEF

76-7160

In The

United States Court of Appeals

For The Second Circuit

MUSIC RESEARCH INC., and ADELPHI RECORDS, INC.,

Plaintiffs-Appellees-Appellants,

vs.

VANGUARD RECORDING SOCIETY, INC.,

Defendant and Third-Party Plaintiff-Appellant-Appellee,

vs.

HERB GART d/b/a HERB GART MANAGEMENT, INC.,

Third-Party Defendant.

REPLY BRIEF FOR DEFENDANT AND THIRD-PARTY PLAINTIFF-APPELLANT-APPELLEE

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-against-

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Third Party Defendant.

REPLY BRIEF OF DEFENDANT AND THIRD PARTY PLAINTIFF - APPELLANT - APPELLEE

Preliminary Statement

Plaintiffs' Reply Brief obscures the issues in this case, which are of utmost simplicity. For the sake of clarity, they are best restated at the outset.

Music Research claims to be the owner of certain intangible rights, namely, the exclusive right to market recordings of one Mississippi John Hurt. Music Research obtained those

rights by contract with Hurt, made in 1963. Plaintiffs claim that Vanguard damaged Music Research and Adelphi, to whom Music Research licensed the right to market Hurt recordings in 1970, by wrongfully marketing two Hurt record albums, beginning in 1971 and 1972, respectively.*

Three separate claims--sounding in unfair competition, unjust enrichment, and tortious interference with the 1963 Hurt-Music Research contract--all advanced the essential claim that Vanguard's release of the Hurt albums for sale was unauthorized, and wrongfully deprived plaintiffs of the opportunity to market Hurt recordings without competition from others. These claims were all dismissed by the Trial Court on the sole ground that plaintiff Music Research had entered into a valid and binding agreement with Vanguard and Hurt, which "sanctioned or authorized" all that Vanguard did.

A fourth claim asserted by Music Research, based on fraud, was found by the Court "sufficiently colorable" not to be dismissed.**

The claimed fraud consisted of false statements, made some months after the contract between Music Research, Hurt and Vanguard had been made, to the effect that a contract, evidently one permitting Vanguard to release only the first two Hurt albums, would be submitted to the president of Music Research for signature.

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* Vanguard had released two earlier Hurt albums, in 1966 and 1967, respectively, but plaintiffs do not complain about those albums.

** Even this claim was dismissed as against Adelphi.

The proof of the fraud claim, however, was fatally defective because none of the other elements necessary to recovery were established. The basic deficiency lies in the failure, indeed the impossibility, to connect the claimed damages with the false statements.

The rule which compels reversal can be stated in a number of ways.

Perhaps the simplest formulation is that there is no liability for fraud, no matter how immoral defendant's conduct may have been, as long as defendant obtained no more than was its legal due. It is not questioned that the Music Research-Hurt-Vanguard agreement, which the Court held valid, antedated by some months the alleged fraud. Since the agreement authorized all that Vanguard did concerning Hurt recordings, Music Research had already ceded all pertinent rights to Vanguard. Music Research could not be defrauded out of what it had already licensed to Vanguard by valid contract. Conversely, Vanguard obtained no more than was its legal due.

Another formulation is contained in the rule governing the measure of damages for fraud, the "out-of-pocket" rule. Plaintiff may only recover the value of what it parted with in reliance on false statements. Obviously, Music Research parted with nothing in reliance on fraudulent statements which it had not already ceded by contract.

The "damages" complained of were the inevitable result of Vanguard's exercise of its contractual rights to market Hurt recordings and could have no relation to reliance on false statements.

While not necessary for the determination of this case, it is clear that even had Music Research not contracted with Vanguard for the latter's release of four Hurt albums, Music Research still would not have parted with anything of value. Without such a contract, it would have retained inviolate its claimed exclusive rights to market Hurt recordings. On that assumption, plaintiffs' claims sounding in unfair competition, etc. would have plausibility and should have to be tried on the merits.

Under neither assumption, however, do the facts establish a prima facie case of fraud resulting in damage to Music Research.

The other questions involved on this appeal seem sufficiently clear so as not to require discussion here.

However, to avoid continuous repetition, it should be observed that plaintiffs' reliance on the resolution of questions of fact by the jury is inapposite, since Vanguard, of course, tenders only issues of law.

POINT I

MUSIC RESEARCH DID NOT PART WITH ANYTHING OF VALUE IN RELIANCE ON THE CLAIMED MISREPRESENTATIONS

Vanguard's Main Brief (Point I, pp. 19-25) demonstrates that Music Research simply did not part with anything of value in

reliance on fradulent statements. Rather, all of its claimed "damages" were the natural and unavoidable consequences of Vanguard's exercise of its contractual right to market the four Hurt albums. The Trial Court ruled that Music Research was bound by the contract authorizing Vanguard to market those albums, and it follows inescapably from that ruling that Music Research was legally required to tolerate Vanguard's sale of the albums and their effect on the market for Hurt recordings.

Plaintiffs attempt to deal with this obstacle to recovery by flatly denying that the Trial Court ruled that Music Research was bound by the contract (P.R.Br. pp. 4-5). According to plaintiffs' Reply Brief (p. 5):

> "The Court merely ruled (as to Vanguard's Rule 50 motion to dismiss all of the causes of action of Music Research) that, since Vanguard's interference with the Music Research-Hurt contract occurred after the executory Vanguard-Music Research-Hurt contract (not yet executed by Hoskins) was delivered to Vanguard by Gart, and since Gart did have some degree of apparent authority to negotiate, that the interference was not actionable by Music Research under its three causes of action sounding in tortious interference with contract, unjust enrichment and unfair competition. The Court therefore granted to Vanguard's motion to dismiss as to those causes of action, but denied the motions as to the remaining cause of action for fraud (Tr. 408a)."

This passage is incomprehensible and, in any event, absurd. Had the Court not held that Vanguard had the contractual

right to market its Hurt albums, there would be no conceivable justification for its dismissal of plaintiffs' claims sounding in unjust enrichment and unfair competition. It is hornbook law, and plaintiffs devote virtually their entire Main Brief (pp. 14-25) to show, that one who unlawfully markets what another has the sole right to market commits an actionable tort. In their Main Brief (p. 13), plaintiffs concede that the Trial Court "reasoned" that plaintiffs were not entitled to recovery on the dismissed counts because Vanguard released the Hurt "records pursuant to that agreement". There they only complained that the Court's ruling was erroneous "because the issue of Gart's authority", on which the validity of the contract depended, should not have been decided by the Court (p. 13).

Since plaintiffs seemingly are no longer willing to concede the obvious, it is necessary to show in detail that the Trial Court ruled the Vanguard contract valid and binding on Music Research.

Near the end of plaintiffs' case, the Trial Court signaled its forthcoming ruling as follows (253a):

> "THE COURT" I would like to address a question to plaintiffs' counsel here just to make absolute certain that I understand the contentions.
>
> "Is there anything that Vanguard did insofar as concerns Music Research, Inc., which was not sanctioned or authorized by Exhibit 57, [the Vanguard-Music Research-Hurt contract] if we are to assume that Exhibit 57 was a document created by the Gart Corporation either by actual authority or apparent authority."

In the colloquy which followed (253-55a), plaintiffs conceded that all of Vanguard's acts were authorized by that contract, with "minor" and "unfounded" exceptions (407-08a).

The question which the Trial Court left open at that point, whether Gart had "either actual authority or apparent authority" to bind Music Research to the contract, was decided against plaintiffs' at the end of their case.[4] In dismissing all of plaintiffs' claims, other than the Music Research fraud claim, the Court below ruled (406-07a):

> "I think that any reasonable juror must, on the evidence of this case, find that Mr. Gart or his corporation at the very least, had apparent authority".

The Trial Court's ruling was expressly based on the admissions of Hoskins, the president and sole shareholder of Music Research, "which conclusively shows at least apparent authority on the part of Gart and probably actual authority" (407a).

At the trial, plaintiffs clearly indicated their correct understanding that the dismissal of their other claims was based on a finding that the contract authorizing Vanguard to market its Hurt albums was binding on Music Research. In arguing that the Court should reconsider the dismissal, plaintiffs' counsel argued that the jury should determine the scope of Gart's "actual authority" to bind Music Research. In rejecting this argument, the Trial Court ruled (408a):

> "Yes, but the man has apparent authority, that is enough."

Plaintiffs are aware, of course, of the crucial importance of the Trial Court's ruling that Gart had "apparent authority" to bind Music Research. They argue at great length (P.R.Br. pp. 6-10) that that ruling was wrong. The high point of plaintiffs' argument is the truism that if Vanguard had notice of Gart's alleged lack of authority, Gart could have had no "apparent authority" (P.R.Br. p. 10).

In Point VII of its Main Brief (pp. 43-47), Vanguard shows that the Trial Court's ruling was fully warranted by the evidence. In any event, it became the law of the case. Vanguard properly relied on it, submitted no evidence of its own on this issue and let the case go to the jury, confident that that ruling established that it had done nothing that it was not legally entitled to do.

However, even assuming arguendo that the ruling was erroneous, it does not follow that the judgment below can be affirmed. At the very least Vanguard would be entitled to reversal so that it could have its day in court to adduce evidence of its own on the issue of the validity of the contract authorizing Vanguard to market its Hurt albums.

In a crude effort to confuse, plaintiffs quote at length a holding that a contract, the making of which was induced by fraud, is invalid (P.R.Br. p. 11). No such issue was ever raised in this case at the trial, or submitted to the jury. Nor is such a theory consistent with the Trial Court's ruling that the contract was valid and binding. Apart from all else, it is undisputed that the alleged false statements were made months after the Music Research-Hurt-Vanguard agreement.

In a final desperate attempt to uphold the verdict, plaintiffs suggest that even granting the validity of the Vanguard-Music Research agreement, as held by the Trial Court, they still suffered the damages which the jury awarded. They suggest that "it can be inferred" that, in reliance on false representations, Music Research "timed the release of Music Research's vault material" after the release of Vanguard's third Hurt album. (P.R.Br. pp. 13-14).

However, this afterthought was never submitted to the jury and has no basis in the record. There was no evidence whatever that Music Research "timed" its planned release of Hurt recordings in reliance on false representations. The proof of damages was wholly inconsistent with such a theory and no measure of damages consistent with it was given to the jury.

All the damage evidence assumed a non-competitive market for Hurt recordings. In fact, plaintiffs claimed that the market for Hurt recordings was limited and could not tolerate competitive releases of Hurt material by separate companies (e.g., 20-1a, 120a, 251a, 264-72a, 276a). However, since Vanguard had the contractual right to release its third and fourth albums in competition with Music Research, the latter's damages, if any, obviously were very different from those measured on the assumption that Music Research had a monopoly position.

Music Research could not materially have improved its market position even if it had timed the release of its planned Hurt album prior to Vanguard's release. Its market position would have been damaged just as much, or at least nearly as much, by a release on the part of Vanguard shortly before or shortly after one by Music Research. Even if there had been reliance in the matter of timing, it would be wholly immaterial.

In any event, this farfetched theory of the case was not advanced below, and therefore, cannot be used to justify the result on appeal. North American Leisure Corp. v. A & B Duplicators, Ltd. 468 F.2d 695 (2 Cir. 1972); National Equipment Rental Ltd. v. Starlezi, 283 F.2d 600 (2 Cir. 1960).

POINT II

THERE WAS NO EVIDENCE TO SUPPORT THE DAMAGE AWARD

Point II of Vanguard's Main Brief (pp. 26-28) demonstrates that there was no evidence to support the damage award because the only damage evidence, introduced before Adelphi's claims were dismissed, dealt with Adelphi and not with Music Research. It is also demonstrated (Vanguard Main Brief pp. 28-30) that, assuming Music Research could have sustained any damages in reliance on false statements, they could have amounted, at most, to a small fraction of those claimed for Adelphi.

Plaintiffs obfuscate the issue by deceptively summarizing the damage proof as if it applied to Music Research (P.R.Br. pp. 16-19). In fact, every witness who gave evidence on the damage issue spoke only concerning projections of Adelphi's lost profits--a crucial point which plaintiffs suppress in their Reply Brief.

Thus, Rosenthal (P.R.Br. pp. 16-17) expressly based his "expert opinion" concerning the value of the Music Research vault tapes on a projection of the profits which Adelphi could have realized by marketing five albums from those tapes under its 1970 license agreement with Music Research (Vanguard Main Brief pp. 27-28; see also, e.g., 257a, 269-70a; Exh. 91, 535-39a). Rosenthal's sales projection "of 35,000 for each LP recording" (P.R.Br. p. 16) was expressly based on Adelphi's "capab[ility] of distributing that number of records" in 1970 (291a)--not Music Research's. Rosenthal's projected "profit margin of $1.41 per LP" (P.R.Br. p. 16) was expressly based on Adelphi's profit margin as codified in Exhibit 91 (269-71a), a calculation of "the lost profits of Adelphi" (257a).

The very record references given in plaintiffs' discussion of Rosenthal's evidence (P.R.Br. pp. 16-17) illustrate that it had applicability only to Adelphi's lost profits, and had nothing to do with the lost profits or damages of Music Research.

Denson did not testify concerning the number of Hurt albums "a company could have sold" (P.R.Br. p. 17). He testified about the market potential of Hurt records if distributed by a company

"about the same size" as Adelphi (322-23a). Similarly, "Denson's profit margin of $1.50" (P.R.Br. p. 17) was the profit margin of his own company, which was "about the same size" as Adelphi (321-22a). McLynn (P.R.Br. p. 19) also dealt only with the projected sales of Hurt records if distributed by Adelphi (308a).*

The difference is real, and was implicitly conceded by plaintiffs in the questions of their counsel, which all sought opinions based on the distribution capability and profit margin of a company of Adelphi's size (e.g. 291a, 321a). Rosenthal testified in some detail about Adelphi's expertise and extensive distribution facilities (242-43a). It was conceded that Music Research, on the other hand, was a fledgling company (15a) with a poor performance record (Vanguard Main Brief p. 9), which was forced to give away the lion's share of possible profits to Adelphi under their 1970 license agreement (Vanguard Main Brief pp. 28-29).

The damage evidence came into the case before Adelphi's claims were dismissed. It dealt solely with Adelphi's damages and the discussion of damage evidence in plaintiffs' Reply Brief (pp. 14-19) relates only to Adelphi's projected losses.

Assuming that damages were recoverable by Music Research for fraud, Vanguard's Main Brief (pp. 28-29) demonstrates that they

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* This evidence is again relied on at pages 18 and 19 of plaintiffs' Reply Brief to calculate Music Research's "total loss" under its contract with Adelphi. See discussion infra, p. 13.

could have been only a small fraction of Adelphi's.

Plaintiffs' Reply Brief attempts to deal with this demonstration by the simple expedient of distorting the record so as to attribute to Music Research the projected profit margin and sales capacity of Adelphi, concerning which plaintiffs' "expert witnesses" testified (P.R.Br. pp. 18-19).

Plaintiffs go further. Their Reply Brief calculates what Music Research's total gross profits might have been, assuming that Adelphi's sales capacity and profit margin was attributable to Music Research. Their calculation of a "total loss of $287,500.00" (P.R.Br. p. 19) makes no provision whatever for Music Research's obligation to pay "publishers' fees" and royalties to Hurt of half of all amounts collected by Music Research (Vanguard Main Brief pp. 28-29).

It is of no avail to Music Research to argue that its 1970 agreement with Adelphi did not license to Adelphi its entire vault of Hurt recordings (P.R.Br. p. 19). The license agreement (Exh. 11; 489-90a), ambiguous as it may be, does seem to license to Adelphi the use of Music Research's entire vault of Hurt recordings. It is, however, not necessary to debate this issue. The crucial point is that plaintiffs' entire damage proof presumed that Adelphi would market five Hurt albums--the maximum number capable of being manufactured from the vault tapes, according to Adelphi's president (Vanguard Main Brief p. 27).

In sum, plaintiffs' Reply Brief fails to refute Vanguard's demonstration that Music Research's damages were not proven at the trial and could have been, at most, only a small fraction of Adelphi's.

In a final, desperate, effort to lend some plausibility to the verdict, plaintiffs discuss "the true nature of the numbers involved in this litigation " (P.R.Br. p. 20). The use of the word "numbers", as distinguished from profits or losses, is significant, because the figures mentioned have no relation whatever to anyone's profits or damages. From Vanguard's royalty statements, and by improper reference to depositions which are not a part of the record, plaintiffs purport to calculate the gross retail sales of Vanguard's four Hurt albums by retailers throughout the country. The sums received by countless retailers over a ten-year period, of course, bear no relation to anyone's profits, realized or unrealized, since neither Vanguard nor Adelphi nor Music Research sold at retail.*

Plaintiffs' calculations and excursions outside the record only show their desperation in trying to justify the verdict. The simple and undisputed truth is that Vanguard lost between $11,000 and $20,000 on its release of the two albums at issue (Exh. 63, 513a).

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* Plaintiffs' damage proof--including Exhibit 91--show that Adelphi projected sales to wholesalers at less than half the suggested retail price of Hurt albums, and profits at less than 25 percent of such suggested retail prices (535-39a, 270-72a).

Nor is the Court's charge (P.R.Br. pp. 14-15) relevant to the issue raised. There was no evidence concerning damages purportedly sustained by Music Research for the jury to consider, and its verdict cannot be justified.

POINT III

THERE WAS FUNDAMENTAL ERROR IN DISREGARDING THE UNCONSCIONABILITY OF THE 1963 MUSIC RESEARCH-HURT AGREEMENT AND ITS REPUDIATION BY HURT

In answer to Point III of our Main Brief, plaintiffs advance two contentions.

One is reliance on a "well-settled" rule that "unconscionability of a contract may not be raised by an unrelated third party as a defense to that party's tortious conduct" (P.R.Br. p. 24). There is no such rule, nor do the authorities relied upon by plaintiffs suggest that such a rule exists.

Rather, those authorities (so far as pertinent at all) merely deal with the principle that a party is liable for inducing the breach of a voidable contract, including one that is voidable for unconscionability. Rice v. Manley, 66 N.Y. 82 (1876), although sounding in "fraud", holds simply that there is liability for fraudulently causing the breach of a contract, even if the contract is unenforceable under the Statute of Frauds.

The Trial Court excluded all evidence concerning the unconscionability of the 1963 Hurt contract, under which Music Research acquired the intangible rights on which it sued, on the ground that unconscionability was irrelevant (135-147a). In making this ruling, the Court addressed itself only to the claim, later dismissed, that Vanguard induced Hurt to repudiate his original 1963 agreement with Music Research (136-42a).

As applied to the fraud claim, however, this ruling was clearly erroneous. If the contract was unconscionable and was, therefore, effectively repudiated by Hurt*, Music Research was left without any intangible rights to Hurt's performances which could be violated. The issue of the continued validity of the Hurt-Music Research agreement is relevant, indeed basic, to the fraud claim. Clearly Vanguard should have been permitted to prove unconscionability, for coupled with repudiation, it constituted a complete defense.

Plaintiffs' second contention is that "as a matter of law, the 1963 contract was neither unconscionable as written nor as applied" (P.R.Br. p. 25). However, such a determination cannot be made without receiving Vanguard's evidence on this issue.

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* There was overwhelming evidence that the contract was repudiated by Hurt before his death (Vanguard Main Brief, pp. 11-12).

The terms of the 1963 Hurt-Music Research contract (Vanguard **Main** Brief pp. 7-8) were of such harshness as at least to suggest "unconscionability." The circumstances surrounding the making of the contract and the respective positions of the parties--the fact that a 71-year old black sharecropper executed the contract without legal advice while in the office of the lawyer for the other party (ibid, pp. 6-7)--also suggest unconscionability.

Under such circumstances it is settled that a Court must take evidence to determine unconscionability. While unconscionability is a question of law for the Court, and not a jury question, the Court must accord the parties a hearing on the issue. See 1 Anderson, Uniform Commercial Code (1970) §2-302:21, which reads in pertinent part as follows:

> "The unconscionable character of a clause or contract is to be determined, not merely from the terms of the contract itself, but from its terms in the context of its background and operation. The Code therefore gives the parties the right to a hearing at which to present evidence relating to such background and operation" (Footnotes omitted).

The doctrine of unconscionability, as codified in the U.C.C., applies not only to sales but to other areas of the law as well. See the excellent, detailed discussion in Abert Merrill School v. **Godoy**, 78 Misc.2d 647, 648-50, 357 N.Y.S.2d378, 380-81 (1974) and authorities there collected.

The Court below committed fundamental error in depriving Vanguard of the opportunity to offer such proof, and to show that Music Research had, in fact, lost all rights to Hurt recordings and could have no standing to sue Vanguard for defrauding it of rights which it did not possess.

POINT IV

THE PROOF AFFIRMATIVELY SHOWS THAT MUSIC RESEARCH COULD NOT REASONABLY RELY ON CLAIMED FRAUDULENT STATEMENTS

Plaintiffs contend that Hoskins' claimed reliance on false statements "was sufficiently credible to raise a triable issue of fact for the jury" (P.R.Br. p. 31).

However, the undisputed facts summarized in Vanguard's Main Brief (pp. 34-36) had to alert even the most gullible to the full truth, thus negating reliance as a matter of law (ibid, p. 34).

In their Reply Brief, plaintiffs simply ignore this array of facts. They deal only with the sufficiency of the written notice which Music Research admittedly received (P.R.Br. p. 31). In that connection they make the frivolous claim that the registered letter of Vanguard's attorney did not go far enough in disclosing the true facts. That letter, quoted in our Main Brief (p. 35), tells Hoskins, in so many words (Exh. G2; 569-70a):

> "...Mr. Hurt has entered into an exclusive recording agreement with Vanguard Recording Society, Inc. and that such company is the only party having the exclusive rights to release phonograph records...embodying the performances of Mr. Hurt."

Such formal written notice by registered mail cannot be reconciled with a claim that Music Research relied in good faith on alleged statements that Vanguard did not have a contract with Hurt, authorizing the release of the offending albums.

Next, Music Research pretends to find fault with Vanguard because the latter, in addition to revealing the truth, did not furnish documentary proof of it (P.R.Br. pp. 31-32). This contention runs counter to all authority and is obviously preposterous.

The only other contention which plaintiffs advance in their Point IV is that Gart's knowledge should not be imputed to Music Research. They base this contention on the ground that Gart comes within exceptions to the general rule which imputes knowledge of the agent to his corporate principal (P.R.Br. pp. 27-31). All the exceptions, however, deal with various degrees of infidelity on the part of an agent. The record contains nothing that smacks of double dealing or other infidelity on the part of Gart. Nor does the record support plaintiffs' claim that Gart might have been "acting in concert with Solomon for the purpose of defrauding Hoskins" (P.R.Br. p. 22).

The president of Music Research himself denied that Gart was Vanguard's agent (164a). He testified that Gart "essentially did it [negotiate with Vanguard] for nothing" (233a), acting out of concern for the "well-being" of Mississippi John Hurt and to obtain for Music Research "a good shake" (233a; see also 204-05a). Plaintiffs' counsel, as well as Music Research's president, extolled to the jury the complete disinterest and impartiality of Gart who, to use counsel's words, "was there to give [Music Research's president] some help on negotiating the contract" (441a) and had "no motive" to lie (444-45a).

In any event, the argument that the evidence permits the inference of duplicity was not raised below. It may not be raised for the first time after trial because, by failing to raise it below, Music Research deprived Vanguard of the opportunity to adduce its defense to it. Farr v. Newman, 14 N.Y.2d 183, 188, (1964).

POINT V

THE FRAUD CLAIM WAS BARRED BY THE STATUTE OF LIMITATIONS

From the admitted facts referred to in the preceding Point, and discussed at length in Points IV and V of Vanguard's Main Brief (pp. 33-38), it is clear that "at least the possibility of fraud should have been apparent" to plaintiff in early 1966,

more than six years before this action was commenced. At the moment that "possibility...should have been apparent", the Statute of Limitations began to run (Vanguard Main Brief p. 38).

Since there was no conflict of evidence, there was nothing for the jury to decide (Ibid).

POINT VI

THE JUDGMENT BELOW SHOULD HAVE BEEN VACATED ON DEFENDANT'S RULE 60 MOTION

Music Research's entire case, as it related to damages, was based on the frequently reiterated premise that Vanguard's release of its third and fourth albums pre-empted the market for Hurt recordings so as to make it impossible for plaintiffs to market Hurt recordings (Vanguard Main Brief p. 39). After the trial, Vanguard discovered that plaintiffs, about three months before the trial, had released and were marketing a Hurt recording, and that their respective presidents had perjured themselves on the issue.

In attempting to justify the denial of Vanguard's motion pursuant to Rule 60(b), plaintiffs first echo the finding of the Trial Court that this evidence could have, with due diligence, been uncovered sooner.

Vanguard submitted extensive affidavits, one by a disinterested expert, which on the basis of expert knowledge and detailed consideration of trade practices in the record industry,

showed that plaintiffs' surpression of evidence could not have been discovered earlier with due diligence (576-81a, 640-45a). In the face of such evidence, submitted by affidavits, it would seem an abuse of discretion for the Trial Court to substitute its own judgment as to what due diligence could have accomplished. At the very least, the issue should not have been resolved without an evidentiary hearing, which Vanguard requested (633-34a). Even in the absence of such a request, Vanguard was entitled to an evidentiary hearing before the issue was resolved. Laguna Royalty Co. v. Marsh, 350 F.2d 817, 825 (5 Cir. 1965).

Next, plaintiffs address themselves to the demonstration in our Main Brief (pp. 40-41) that they resorted to flagrant perjury at the trial. Plaintiffs seek to dismiss this as a "bald" allegation. The characterization is untenable. As pointed out in our Main Brief (p. 40), Hoskins, the president of Music Research, testified that he had no intention of putting out a Hurt record album in the summer of 1975. In truth, he intended to put out such a record album in the summer of 1975 and actually "put one out" at that time.

Adelphi's president, Rosenthal, testified that Music Research's vault tapes had only "archival" value. In truth, the tapes had more than "archival value"; they had enough current value

so that Rosenthal, then and there, was actively selling the new Hurt album (Vanguard Main Brief pp. 40-41).

In addition, Adelphi's president gave an evasive and misleading answer to a question by the Court, which was also designed to conceal the new Hurt record (Ibid, p. 41).

If the English language has any meaning, no amount of ultra-sophisticated argument or twisting denials by plaintiffs can possibly obscure the plain fact that plaintiffs' respective presidents resorted to flagrant perjury in two separate instances and to prevarication as well. This would seem more than ample proof of intent to deceive on the issue of damages and obtain a verdict by fraud.

It is true, as plaintiffs argue, that the newly discovered evidence and plaintiffs' fraud did relate only to the issue of damages and not to the issue of liability (P.R.Br. p. 38). But it did relate to the critical damage issue whether Vanguard's albums prevented plaintiffs from releasing Hurt recordings.

In the face of the foregoing, conclusive, demonstration that plaintiffs resorted to perjury and prevarication, it would have been, of course, impossible for the Court below to find that plaintiffs were not chargeable with "fraud, misrepresentation or other misconduct" and the Court did not so find. It merely concludes that the verdict was not obtained by means of the obvious fraud and that the newly discovered evidence would not have altered the outcome of the trial (678a). The ruling was a grave abuse of discretion and was clearly erroneous.

Peacock Records, Inc. v. Checker Records, Inc., 365 F.2d 145, 147 (7 Cir. 1966), in unmistakable terms, formulates the rule which controls this case:

> "We hold that where it appears that perjured testimony may have played some part in influencing the court to render a judgment, the perjury will not be weighed, on a motion to set aside the judgment. This seems self-evident."

The Trial Court itself observed, in denying a motion to set aside the verdict as excessive, that the whole question of damages "revolve[d] about whom you believe..." (483a). The Trial Court, therefore, implicitly found that the verdict depended on damage testimony now demonstrated to be perjurious.

It is obvious that the perjured testimony in the instant case "may have played some part in influencing" the judgment and that it must, therefore, be reversed (italics supplied).

The policy which should govern the disposition of Vanguard's Rule 60 motion is aptly expressed in language approved by Mr. Justice [then Judge] Brennan (quoted in 11 Wright and Miller Federal Practice and Procedure 195):

> "...the spectacle of the machinery of the law bearing down mercilessly, and perhaps ruinously, to collect and deliver over the fruits of undoubted fraud (is) peculiarly odious."

Conclusion

For all the reasons set forth above, Vanguard reiterates its requests for relief stated in the Conclusion of its Main Brief.

Respectfully submitted,

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A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

MUSIC RESEARCH INC., and ADELPHI RECORDS, INC., Plaintiffs-Appellees-Appellants, - against - VANGUARD RECORDING SOCIETY, INC., Defendant and Third-Party Plaintiff-Appellant-Appellee, -against- HERB GART d/b/a HERB GART MANAGEMENT, INC., Third Party Defendant.	*Index No.* *Affidavit of Personal Service*

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Reuben A. Shearer *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 211 West 144th Street, New York, New York 10030

That on the 17th *day of* Sept. *19*76 *at* 375 Park Avenue New York, N.Y.

deponent served the annexed brief *upon* Baker & McKenzie

the attorneys *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,*

Sworn to before me, this 17th *day of* September *19*76

Beth A. Hirsh

BETH A. HIRSH
NOTARY PUBLIC, State of New York
No. 41-4623156
Qualified in Queens County
Commission Expires March 30, 1978

Reuben Shearer

Reuben Shearer